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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN CAVALIER MAHURIEN,

Defendant and Appellant.

B164541

(Los Angeles County
Super. Ct. No. YA052269)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andrew Kauffman, Judge. Affirmed as modified and remanded with directions.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Jeffrey B. Kahan, Deputy Attorney General, for Plaintiff and Respondent.

John Cavalier Mahurien was convicted of attempted carjacking, resisting an executive officer (a felony), and resisting a peace officer (a misdemeanor), with allegations that he had suffered one prior strike and served two concomitant prison terms found true. (Pen. Code, §§ 664, 215, subd. (a), 69, 148, subd. (a)(1), 1170.12, subds. (a)-(d), 667, subds. (a)-(i), 667.5, subd. (b).)¹ He was sentenced to state prison for a term of 16 years, 4 months. Mahurien appeals, contending (I) the misdemeanor resisting count is necessarily included within the felony deterring count and must be reversed; (II) alternatively, that he cannot be punished for both the resisting and the deterring counts; and (III) the abstract of judgment is in need of correction. We agree (as does the Attorney General) that section 654 bars punishment for both the deterring and resisting counts, but otherwise reject Mahurien's claims of error and affirm the judgment.

DISCUSSION

I.

Mahurien contends his conviction of misdemeanor resisting a peace officer must be reversed because it is a lesser included offense within the felony resisting count. We disagree.

A.

Count 2 of the information charged Mahurien with a felony violation of section 69, resisting an executive officer, alleging that he "unlawfully attempt[ed] by means of threats and violence to deter and prevent Parole

¹ All section references are to the Penal Code.

Agent Car[t]er, who was then and there an executive officer, from performing a duty imposed upon such officer by law, *and* did knowingly resist by the use of force and violence said executive officer in the performance of his/her duty."² (Emphasis added.)

Count 3 of the information charged Mahurien with a misdemeanor violation of subdivision (a)(1) of section 148, alleging that he "did willfully and unlawfully resist, delay and obstruct Agent Carter who was then and there a peace officer attempting to and discharging the duty of his/her office and employment."³

Both offenses arose out of the same event – Mahurien was visiting a friend when the friend's parole agent, Derrick Carter, stopped by. Mahurien became "agitated" when Agent Carter started asking him about his parole status, and Agent Carter ultimately ordered Mahurien to go outside. Mahurien refused and told the agent, "You're not going to search me. I'll take it to your dome." Agent Carter drew his gun. Mahurien fled, and about 15 minutes later

² Section 69 provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment."

³ Subdivision (a)(1) of section 148 states: "Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

attempted to take a car from its owner, but fled again when the owner resisted. Mahurien was arrested later the same day.

B.

Section 69 sets forth two separate ways in which an offense can be committed. As the Supreme Court explained in *In re Manuel G.* (1997) 16 Cal.4th 805, 814-815, the "first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty. [Citation.]" When the defendant is accused of attempting by threats to deter or prevent an officer from performing a duty imposed by law, we are concerned only with the first type of offense, and the "central requirement" of the offense is an attempt to deter an executive officer from performing his or her duties imposed by law; unlawful violence, or a threat of unlawful violence, is merely the means by which the attempt is made." (*Ibid.*) When we are dealing with the second type of offense, it is defined in terms of using force to resist an officer in the performance of his duty, and the offense requires that the officer is engaged in such duty when the resistance is offered. (*Id.* at p. 816.)

Mahurien necessarily concedes that, under the statutory elements test, subdivision (a)(1) of section 148 is not a lesser included offense within section 69. He contends, however, that the conjunctive pleading used in the information means the greater felony offense could not be committed without also committing the lesser misdemeanor offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) Mahurien's concession is apt (*People v. Belmares* (2003) 106 Cal.App.4th 19) and his effort to distinguish *Belmares* is interesting -- but irrelevant in light of the instructions given to Mahurien's jury.

"Analysis of the statutory elements of the two offenses shows resisting requires commission of the crime *at the time of* a peace officer's discharge or attempted discharge of a duty of his or her office or employment. (§ 148, subd. (a)(1).) . . . [¶] Deterring, on the other hand, has disjunctive temporal elements, one of which is congruent with, the other of which is inconsistent with, the temporal element of resisting. (§ 69.) '[T]he plain language of the statute encompasses attempts to deter *either* an officer's *immediate* performance of a duty imposed by law or the officer's performance of such a duty at some time *in the future*.' [Citations.] . . .

"By the statutory elements test, then, we hold resisting is not a lesser included offense of deterring since one can deter an officer's duty *in the future* (§ 69) without resisting the officer's discharge or attempted discharge of a duty *at that time* (§ 148, subd. (a)(1)). . . . We turn, then, to the pleadings test.^[4] [¶] . . . [¶] . . .

"Both the deterring count and the resisting count use the word 'resist,' as do the respective statutes. (§§ 69, 148, subd. (a)(1).) Besides that word, the deterring count uses the words 'deter' and 'prevent' and the resisting count uses the words 'delay' and 'obstruct,' as do the respective statutes. (Compare § 69 with § 148, subd. (a)(1).) Since those four words in the pleadings track precisely the identical four words in the Legislature's enactment of the statutes from which the pleadings derive, we turn to traditional principles of statutory

⁴ The only difference between the *Belmares* information and the information in our case is that, in *Belmares*, the section 69 count was charged in the disjunctive (that he attempted to deter or resisted). (*People v. Belmares, supra*, 106 Cal.App.4th at pp. 24-25.)

construction to analyze the pleadings. The first step in that analysis 'is to focus on the words used by the Legislature in order to determine their traditional and plain meaning.' [Citation.] We put aside the sole word in common – 'resist' – and seek the meanings of the other four words.

"In the context of the deterring count, the meaning of 'deter' includes 'turn aside, discourage, or prevent from acting by fear or consideration of dangerous, difficult, or unpleasant attendant circumstances' and 'inhibit.' [Citation.] In the same context, the meaning of 'prevent' includes 'deprive of power or hope of acting, operating, or succeeding in a purpose,' 'frustrate,' 'circumvent,' 'keep from happening or existing,' 'hinder,' and 'stop.' [Citation.]

"In the context of the resisting count, the meaning of 'delay' includes 'put off,' 'prolong the time of or before,' 'postpone,' 'defer,' 'stop, detain, or hinder for a time,' 'check the motion of, lessen the progress of, or slow the time of arrival of,' 'cause to be slower or to occur more slowly than normal,' and 'retard.' [Citation.] In the same context, the meaning of 'obstruct' is 'be or come in the way of,' 'hinder from passing, action, or operation,' 'impede,' 'retard,' 'shut out,' and 'place obstacles in the way.' [Citation.]

"The only word common to the definitions of any of those four words is 'stop,' which appears in the definition of 'prevent' in the deterring count and in the definition of 'delay' in the resisting count. [Citation.] The implications are quite different, however. In the definition of the word 'prevent' in the deterring count, 'stop' stands alone. [Citation.] In the definition of 'delay' in the resisting count, on the other hand, 'stop' appears in only the limited sense of 'stop, detain, or hinder *for a time*.' [Citation.] No synonym of either of the words

'deter' and 'prevent' in the deterring count is the same as any synonym of either of the words 'delay' and 'obstruct' in the resisting count. [Citation.]

"To generalize, the meanings of the words 'deter' and 'prevent' in the deterring count and of the words 'delay' and 'obstruct' in the resisting count have noteworthy differences. The former two tend to connote a decisive, definite, or indubitable quality that contrasts with the provisional, temporary, or tentative note the latter two tend to strike [¶] 'When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in meaning. . . .' [Citation.] In harmony with that principle . . . , we infer from the Legislature's use of markedly different words in the deterring and resisting statutes a legislative intent not to incorporate into either statute the meanings of the words of the other. [Citation.] By the pleading test, then, as by the statutory elements test before, we hold resisting is not a lesser included offense of deterring. [Citation.]" (*People v. Belmares*, *supra*, 106 Cal.App.4th at pp. 23-26, some emphasis added, fns. omitted.)

C.

We reject Mahurien's attempt to distinguish *Belmares* on the ground that, in his information, the deterring offense was charged in the conjunctive rather than the disjunctive used in the *Belmares* information. Whatever merit there may be to this distinction in the abstract, Mahurien's jury could not have convicted him of the resisting part of section 69 -- because the trial court edited CALJIC No. 7.50 to *delete* the resisting alternative and instructed the jury that the only way it could convict Mahurien of the section 69 offense would be by finding he had (1) willfully and unlawfully attempted to deter or prevent an

executive officer from performing his duty and (2) by means of a threat or violence. As *Belmares* explains, this deterring part of section 69 differs from the section 148 resisting crime, and the latter is not included within the former.

II.

Mahurien contends, the Attorney General concedes, and we agree that the resisting and deterring counts arose out of the same course of conduct within the meaning of section 654, and that the sentence imposed for the misdemeanor count must be stayed.

III.

Mahurien contends, correctly, that the sentence pronounced by the court for the misdemeanor was "county jail for 202 days," with credit to be given for time served. The minute order states, incorrectly, that Mahurien was sentenced to 302 days in county jail, with credit due for 302 days (202 days actual custody). The abstract conforms to the minute order, not the sentence pronounced (302 days in jail, with credits for 202 days actual custody plus 100 days conduct credits). Having said all this, the point (as Mahurien concedes) is moot in light of our finding that the misdemeanor sentence must be stayed.

DISPOSITION

Mahurien's sentence is modified to reflect that the sentence imposed on count 3 (misdemeanor resisting a peace officer in violation of section 148, subdivision (a)(1)), is stayed; as modified, the judgment is affirmed, and the cause is remanded to the trial court with directions to issue a corrected abstract of judgment.

NOT TO BE PUBLISHED.

VOGEL (MIRIAM A.), J.

We concur:

SPENCER, P.J.

MALLANO, J.